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No. 88-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PATRICK H. DIAMOND,

Petitioner,

v.

DAVID P. REYNOLDS and
REYNOLDS METALS COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Does this Court's decision in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), grant standing under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, to a dismissed employee to sue the largest shareholder of his former employer and its Chairman of the Board for wrongful discharge where there is not any allegation that his injury flowed from any of the predicate acts constituting the pattern of racketeering?

STATEMENT OF THE PARTIES TO THIS PROCEEDING

The parties to the proceeding below were petitioner Patrick H. Diamond, respondents David P. Reynolds and Reynolds Metals Company, and two other parties, Ralph S. Thomas and Robertshaw Controls Company, neither of whom is a respondent to the instant petition.

In addition to its wholly owned subsidiaries, Reynolds Metals Company is affiliated with the following entities:

1401 17th Street Associates
Aleurope (France) S.A.
Alpart Farms (Jamaica), Ltd.
Alpart Jamaica Inc.
Alternative Housing Associates
Alumina Partners of Jamaica
Aluminerie de Becancour Inc.
Aluminio del Caroni, S.A.
Aluminio Reynolds del Peru Sociedad Anonima
Aluminio Reynolds, Santo Domingo, S.A.
Aluminium Europe S.A., En Abrege: "Aleurope S.A."
Aluminium-Oxid-Gemeinschaft Stade
Aluminium Oxid Stade Gesellschaft mit beschrankter Haftung
Aluminum Corporation of the Philippines
Asociacion Venezolana de Adiestramiento y Desarrollo del Aluminio (AVADAL)
Austria Dosen Gesellschaft mbH & Co. KG
Austria Dosen GmbH
Bartram Airplex Incorporated
Becancour Joint Venture
Bennett Manor Associates
Bevco Containers
Boddington Housing Pty. Ltd.
Broward Lakes Business Park Joint Venture
Burrstone Associates
Bushnell Plaza Development Corporation
Capitol Hill Associates, Ltd.

Cathedral Square Associates
Cathedral Square Associates II
Chasco Woods Associates, Ltd.
Chasco Woods Associates II, Ltd.
Compania Metalurgica Colombiana, S.A. "Comecol"
Crown Oak Associates of Penfield
Curtis Apartments Associates
Cypress Courts Associates, Ltd.
Cypress Cove Associates, Ltd.
Drew Gardens Associates, Ltd.
Eastwick Joint Venture I
Eastwick Joint Venture IV
Eastwick Joint Venture V
Eastwick Joint Venture VI
Egyptian Aluminium Products Company
Envases Valencianos, S.A.
Envases y Alimentacion Madrid, S.A.
Envases y Alimentacion, S.A.
Eskimo Europ, S.a.r.l.
Eskimo Pie Corporation
Eskimo Pie Corporation of Canada, Limited
Gerro Reynolds Dosenwerk GmbH & Co. KG
Grafiba Sociedad Anonima
Halco (Mining) Inc.
Hamburger Aluminium-Werk Gesellschaft mit beschrankter Haftung
Industria Navarra del Aluminio, S.A.
Industrias Lacteas del Yocoima, S.A.
Industrias Metal-Mecanicas del Quindio S.A.
Iranian Aluminium Co. (Sherkat Sahami Iran Aluminium)
Jamaica Alumina Security Company, Ltd.
Kimbrook Manor Associates
Lakeside Village Associates
Lynx-Canada Explorations Limited
Manicouagan Power Company - La Compagnie Hydroelectrique Manicouagan

Midtown Associates
Mill Pond Development Corporation
Mill Pond Towers Associates
Minas do Dragao Ltda.
Mineracao Rio do Norte S.A.
Mineracao Sao Jorge Ltda.
Mineradora de Bauxita Ltda.
Minerais de Aluminio Ltda.
Mount Gibson Joint Venture
The National Housing Partnership
New Eastwick Corporation
Oceanside Estates Associates, Ltd.
One Empire Plaza Associates
Pechiney Reynolds Quebec, Inc.
Phillips-C.B.A. Conductors Limited
Presidential Development Corporation
Presidential Manor Corporation
Rayburn Manor Associates
Regency Joint Venture
Regency West Associates
Reynolds Gilbane Realty Associates
The Reynolds-Gilbane-Weybosset Joint Venture
Reynolds Metals Development Company
Reynolds Philippine Corporation
Reynolds Regency Corporation
Reywest Development Company
Reywest Development Corporation
Ruedas de Aluminio C.A. "RUALCA"
Sherkat Sahami Iran Aluminium (Iranian Aluminium Co.)
Southeast Vinyl Company
Superenvases Envalic C.A.
Titusville Manor Associates
Union Industrial y Astilleros Barranquilla "Unial" S.A.
Venezolana De Aleaciones, S.A. "VALSA"
Volta Aluminium Company Limited
Weybosset Hill Development Corporation
Windermere Associates, Ltd.
Worsley Alumina Pty. Ltd.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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Opinions Below

The opinion of the Court of Appeals for the Third Circuit is attached as Appendix A to the petition. Copies of the opinions issued by the district court resulting in the dismissal before trial of all claims against respondents are attached as Appendix B to the petition. A copy of the opinion issued by the district court after a bench trial dismissing the remaining causes of action against one defendant not involved in this petition is in the Appendix hereto. None of these opinions has been reported.

Statutes Involved

The following statutes are cited in this Brief and reproduced in the Appendix:

Racketeer Influenced and Corrupt Organizations Act:

18 U.S.C. § 1962 (1982)

18 U.S.C. § 1964(c) (1982)

Jurisdiction

The judgment of the court of appeals was entered June 22, 1988. The petition for a writ of certiorari was filed September 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

I.

Statement

A. *Introduction*

The Third Circuit, affirming the district court, held that petitioner, the dismissed chief financial officer of Robertshaw,[1] did not have standing under RICO to sue RMC (at the time of the dismissal the largest shareholder of Robertshaw), Reynolds (then chairman of the board and chief executive officer of RMC and the non-executive chairman of Robertshaw), Robertshaw and Thomas (then chief executive officer of Robertshaw) for wrongful discharge.[2] Petitioner would have this Court resolve

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[1] As used herein, "RMC" refers to Reynolds Metals Company; "Robertshaw" refers to Robertshaw Controls Corporation; "Reynolds" refers to David P. Reynolds; and "Thomas" refers to Ralph S. Thomas. References to "Pet. App." are to the appendix to the petition. References to "Opp. App." are to the appendix to Brief for the Respondents in Opposition. A copy of the Second Amended Complaint is attached as Appendix C to the petition. Because petitioner's Appendix C is not paginated, citations to it are in the form "Second Amended Complaint ¶ ___ (Pet. App. C)." "JA" refers to the Joint Appendix below.

[2] The original Complaint was filed May 15, 1984 before the United States District Court for the District of Delaware; a First Amended Complaint was filed July 9, 1984; a Second Amended Complaint was filed March 5, 1985. The RICO Counts (Counts One through Three), and claims under state law

(Footnote continued)

a non-existent conflict among the circuits and review a decision of the Third Circuit that applied this Court's decision in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), in a straightforward and unexceptional way, all to devise a new standard of RICO standing that petitioner could not meet were it to be created.

The district court and the Third Circuit correctly held that petitioner's Second Amended Complaint does not plead the necessary factual nexus between his alleged injury, his purportedly wrongful discharge, and the alleged predicate acts, the supposed mail fraud violations. The court below, ruling on the Complaint before it, held in a manner consistent with *Sedima* and every court of appeals decision to date, that a dismissed employee who fails to plead that his dismissal flowed from the commission of the predicate acts lacks standing to sue under RICO. Nor could petitioner meet the RICO standing requirement he asserts to be proper. The district court, in a bench trial, specifically found that the centerpiece of petitioner's RICO fantasy, RMC's "plan" to purchase Robertshaw on the cheap, did not exist. The trial record established that petitioner did nothing to manifest "opposition" to this non-existent plan (allegedly why he was fired). As it ultimately turned out, the "plan" never occurred because a third party, not RMC, bought Robertshaw.

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for wrongful discharge (Counts Six and Seven), were dismissed by the district court for failure to state a claim. *Diamond* v. *Reynolds*, No. 84-280 (D. Del. Jan. 13, 1986) (Pet. App. B at 21). Count Four, which alleged tortious interference with a prospective contractual relation, was dismissed on summary judgment. *Diamond* v. *Reynolds*, No. 84-280 (D. Del. July 15, 1986)(Pet. App. B at 70). Counts Five and Eight, claims against Robertshaw for breach of contract, were tried to the district court in a bench trial, resulting in a judgment for that defendant. *Diamond* v. *Reynolds*, No. 84-280 (D. Del. Aug. 28, 1987) (Opp. App. A4-A29). Both Counts incorporated the allegations relating to the alleged RICO violations. *See* Second Amended Complaint ¶¶ 71, 86 (Pet. App. C). The Third Circuit affirmed the district court's various opinions dismissing all the petitioner's claims, but reversed and remanded the entry of judgment against petitioner on Robertshaw's counterclaim. On August 15, 1988, petitioner exchanged general releases with Thomas and Robertshaw. Thereafter, petitioner filed the instant petition for a writ of certiorari.

B. *The Second Amended Complaint Does Not Plead Any Factual Nexus Between Petitioner's Dismissal And The Alleged Predicate Acts*

The three RICO Counts rest upon petitioner's allegations that RMC, Reynolds and Thomas failed to disclose a scheme to control and ultimately take over Robertshaw, allegedly to defraud the Robertshaw shareholders by buying Robertshaw at the lowest possible cost.[3] *See generally* Second Amended Complaint ¶¶ 11-12, 31-51 (Pet. App. C). Petitioner alleges that the failure to disclose this "scheme" injured the Robertshaw shareholders. *See, e.g., id.* ¶¶ 32-51 (Pet. App. C). Petitioner sues only as a former Robertshaw employee, officer and director, and does not allege that he was a Robertshaw or RMC shareholder. *Id.* ¶ 1 (Pet. App. C). Petitioner also does not allege that respondents devised a scheme to defraud him, or that he relied on or was injured by any of the alleged misrepresentations in or omissions from any of the allegedly fraudulent documents to his detriment. To attempt to meet the statutory requirements that respondents engaged in a "pattern of racketeering," petitioner alleges twelve purported separate mail fraud violations by the respondents. In each instance, the parties allegedly deceived were the Robertshaw shareholders or the public, not petitioner:

- ¶ 35: "scheme to defraud the shareholders"
- ¶ 36: misrepresentation "designed to deceive and mislead the stockholders of Robertshaw"
- ¶ 38: "deceive the public, including many shareholders of Robertshaw"
- ¶ 40: "deceive and mislead the stockholders"
- ¶ 42: "deceive and mislead the shareholders"

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[3] Respondents noted below that there is nothing criminal in seeking to buy at the lowest price, and that petitioner's allegations of a "plan" to do so would not make the conduct criminal or fraudulent had it occurred.

- ¶ 45: "defraud the shareholders"
- ¶ 46: "deceive and mislead the stockholders of Robertshaw"
- ¶ 47: "a manipulative device intended to decrease the number of [Robertshaw] shares outstanding without increasing the stock price"
- ¶ 48: scheme "to eliminate all the Robertshaw shareholders"
- ¶ 49: a mailing "designed to mislead the public"
- ¶ 50: filed a Form 13-D "designed to mislead the public"
- ¶ 51: press release "intended to deceive the public."

See also Second Amended Complaint ¶ 10 (Reynolds and Thomas violated "their fiduciary duty to all the shareholders of Robertshaw . . . .") (Pet. App. C).[4]

At no point does the Second Amended Complaint suggest that petitioner was ever solicited to join the violations, that is, to participate in the preparation and delivery of the materials sent to shareholders that allegedly form the predicate acts of mail fraud. The pleading is barren of any allegation that respondents sought petitioner's cooperation in the alleged scheme. This is not a case in which a dismissed employee has alleged he was fired for refusing to join in the commission of the predicate acts.

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[4] Respondents further argued below that none of the predicate acts alleged pleaded violations of the mail fraud statute because each depends upon taking an objectively lawful act or statement and asserting that it is fraudulent because it failed to disclose the hidden culpable motivation of the actors. The cases are legion, however, refusing to find fraudulent the allegation that the defendants perpetrated a material omission "when they failed to 'discover and adjudge . . . faithless motives for their actions . . . .'" *Biesenbach* v. *Guenther*, 588 F.2d 400, 402 (3d Cir. 1978) (citations omitted).

The Second Amended Complaint is barren of any allegation that petitioner's injury, his "wrongful discharge," flowed from the commission of the alleged predicate acts, the mail fraud violations, and specifically disavows any nexus between the alleged predicate acts and petitioner's injury. Instead, the Second Amended Complaint pleads that petitioner's injury arose from his being fired. His discharge is linked to the alleged scheme by the conclusory allegation that the respondents "caused the firing [of petitioner] to punish him for his opposition to the plan of the defendants . . . ." Second Amended Complaint ¶ 12(E) (Pet. App. C).

Petitioner is totally silent as to what constituted his purported "opposition" or how it was manifested. After alleging in his 45-page Second Amended Complaint an elaborate scheme to defraud the Robertshaw shareholders and to take over Robertshaw, petitioner refers only to "his opposition" to the alleged scheme that supposedly occurred throughout the more than three years he was a Robertshaw officer and director. At no point does the Second Amended Complaint allege what petitioner did to disclose publicly his opposition to respondents' alleged scheme, when the opposition became known, and what, if anything, he did to manifest his alleged opposition so as to give respondents reason to discharge him. Nowhere does petitioner allege what he did to "oppose" or to take action against that alleged scheme. Petitioner does not allege any connection between any of the mailings and petitioner's alleged "opposition." Nor does he explain why if, as he alleges, he opposed the "scheme" during the more than three years he was a Robertshaw officer and director, respondents waited three years to get rid of him.

C. *The Decisions Below*

The district court dismissed the three RICO Counts on the grounds that petitioner had failed to state a cause of action. *Diamond* v. *Reynolds*, No. 84-280 (D. Del. Jan. 13, 1986) (Pet. App. B at 26). Following and applying the then recent Supreme Court holding in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), the district court concluded that petitioner did not have

standing and had failed to allege and establish that his injury had been caused by any of the predicate acts, *i.e.*, mail fraud violations, purportedly constituting the "pattern of racketeering activity." *Diamond* v. *Reynolds*, No. 84-280 (D. Del. Jan. 13, 1986) (Pet. App. B at 10).

The Third Circuit Court of Appeals (Becker, Hutchinson and Scirica, Circuit Judges) upheld the district court's decision. *Diamond* v. *Reynolds*, No. 87-3643 (3d Cir. June 22, 1988) (Pet. App. A). In accordance with the holding of *Sedima* and the appellate cases following *Sedima*, the court below observed that to have standing, petitioner's injury must be an " 'injury flowing from the commission of the predicate act, not injury flowing from the pattern of such acts.' " *Id.* (quoting *Town of Kearny* v. *Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1268 (3d Cir. 1987)) (Pet. App. A at 8). The court below affirmed the dismissal of the RICO Counts because:

> Diamond's dismissal did not flow from the commission of the predicate acts, which involved mailings to [Robertshaw] shareholders concerning the acquisition of [Robertshaw] stock.

Id. (Pet. App. A at 8).

The court agreed with decisions in other circuits, stating that:

> whether Diamond was discharged in retaliation for objecting to the alleged conspiracy or to prevent him from reporting the conspiracy, he does not have RICO standing. *See Pujol* v. *Shearson*, 829 F.2d 1201, 1205 (1st Cir. 1987); *Nodine* v. *Textron*, 819 F.2d 347, 348 (1st Cir. 1987); *Morast* v. *Lance*, 807 F.2d 926, 929 (11th Cir. 1987). Diamond was not a target – either directly or indirectly – of the alleged criminal conduct, and his discharge cannot provide basis for RICO standing. The district court properly held that Diamond's discharge was not sufficiently linked to the predicate acts that comprised the pattern of racketeering activity.

Id. (footnote omitted) (Pet. App. A at 9-10).

The court below also noted that its holding did not mean that discharged employees may never bring a RICO action against its employers, observing that those who are fired for refusing to join a RICO conspiracy present a different issue which may permit recovery under RICO. This, however, is not petitioner's case. Finding that "Diamond never claimed that: (1) appellees solicited his membership in the scheme; or (2) he refused their offer," the court of appeals left this issue for another day. *Id.* (Pet. App. A at 10 & n.2).

II.

Summary Of Argument

The decision below does not conflict with this Court's decision in *Sedima*. The court of appeals held that a plaintiff who does not allege injury flowing from the commission of the predicate acts constituting the alleged RICO violations does not have standing. Petitioner's Second Amended Complaint is barren of any allegation that could establish the necessary factual nexus. This decision is correct and does not conflict with that of any other court of appeals.

In addition, the district court's finding after a bench trial and left undisturbed on appeal, that RMC, Reynolds and Thomas had no plan to take over Robertshaw, would defeat any claim that petitioner was dismissed because he opposed the purported plan. Further review is unwarranted.

III.

Reasons For Denying The Writ

A. *There Is No Conflict Between The Decision Of The Court Of Appeals And This Court's Opinion In* Sedima

A RICO plaintiff has standing to sue only if "he has been injured . . . by the conduct constituting the violation." *Sedima, S.P.L.R.* v. *Imrex Co.*, 473 U.S. 479, 496 (1985). The conduct constituting the violation is, of course, the commission of the underlying predicate acts in connection with the conduct of the enterprise:

> [w]here the plaintiff alleges each element of the [RICO] violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. . . . Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.

Id. at 497 (footnote omitted). *See also Haroco, Inc.* v. *American National Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (*per curiam*) ("[T]his 'by reason of' language [in 18 U.S.C. § 1964(c)] . . . simply imposes a proximate cause requirement on plaintiffs. The criminal conduct . . . must, directly or indirectly, have injured the plaintiff's business or property."). RICO thus does not shield every injury, nor does it insure against every wrong that can be traced to a predicate act. As this Court explained, a RICO defendant who violates section 1962 " 'is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured.' " *Sedima*, 473 U.S. at 496-97 (quoting *Haroco*, 747 F.2d at 398).

Sedima and *Haroco* thus establish that for purposes of determining whether RICO standing exists, the allegations in a complaint must show that the alleged injury was proximately caused by the predicate acts. The inquiry is not, as petitioner suggests, whether a RICO plaintiff "has alleged a direct or indirect injury, but rather whether he or she has alleged an injury that 'flows from' the predicate acts." *Bass* v. *Campagnone*, 838 F.2d 10, 12 (1st Cir. 1988). *Accord Sperber* v. *Boesky*, 849 F.2d 60, 64 (2d Cir. 1988) ("It is clear that both direct and indirect injuries must be proximately caused."). The resolution of this inquiry necessarily turns on the particular facts alleged in the complaint. *National Enterprises, Inc.* v. *Mellon Financial Services Corp. Number 7*, 847 F.2d 251, 254 (5th Cir. 1988) ("[W]hether a given party has suffered a RICO injury is a fact-heavy question.").

Instead of relying on the "direct/indirect injury" dichotomy petitioner advances, the court below properly focused its inquiry on whether the injury allegedly suffered flowed from the commission of the predicate acts. It found that petitioner's Second Amended Complaint did not allege the necessary causal relationship between his claimed injury, *i.e.*, the "wrongful discharge," and the mail fraud violations said to have been committed by Reynolds, RMC and Thomas in connection with Robertshaw's conduct. Specifically, it held:

> Diamond's dismissal did not flow from the commission of the predicate acts, which involved mailings to [Robertshaw] shareholders concerning the acquisition of [Robertshaw] stock.
>
> . . . Diamond was not a target – either directly or indirectly – of the alleged criminal conduct, and his discharge cannot provide the basis for RICO standing.

Diamond v. *Reynolds*, No. 87-3643 (3d Cir. June 22, 1988) (Pet. App. A at 8-9).

There is thus no conflict between *Sedima* and the decision of the court below. The court of appeals accurately interpreted *Sedima* and correctly applied it to the facts before it.

B. *There Is No Conflict Among The Circuit Courts About Whether A Dismissed Employee Has RICO Standing Under The Circumstances In This Case*

Following *Sedima*, every court of appeals addressing this issue has rejected the notion that an employee who has lost his job, but who has not been injured by any of the alleged predicate acts, has standing to bring a RICO action against his former employer.

In *Pujol* v. *Shearson/American Express, Inc.*, 829 F.2d 1201, 1204-05 (1st Cir.), *amended*, No. 87-1190, slip op. (1st Cir. Nov. 19, 1987), plaintiff alleged that his former employer and agents violated the law by engaging in illegal banking transactions, defrauding investors and furthering such misdeeds through the use of the mail and wires. Finding that plaintiff "was not a defrauded client or investor and was not a target of any of the acts pleaded as 'predicate acts' in the RICO claim," the Court of Appeals for the First Circuit dismissed the complaint. 829 F.2d at 1205. Similarly, in *Nodine* v. *Textron, Inc.*, 819 F.2d 347, 348 (1st Cir. 1987), the dismissed employee alleged that defendants were guilty of mail and wire fraud, obstruction of justice, obstruction of a criminal investigation, and interference with commerce. The First Circuit dismissed the complaint because "[n]one of these alleged offenses harmed Nodine in his business or property." *Id.* at 349 (footnote omitted). In *Morast* v. *Lance*, 807 F.2d 926, 929 (11th Cir. 1987), the employee alleged he was fired for reporting a banking irregularity and cooperating with a subsequent investigation. The Eleventh Circuit held plaintiff lacked standing under RICO because his discharge "did not flow directly from the predicate acts, the defendants' banking violations." *Id.* at 933 (footnote omitted).

This case is, then, not an appropriate vehicle to interpret the possible basis for a RICO action by a dismissed employee. As

seen, there is no conflict among the circuit courts about whether a former employee, such as petitioner, has standing to sue his employer under RICO.[5]

C. *There Is No Conflict Among The Circuit Courts About Whether* Sedima *Expanded Or Restricted Standing Under RICO*

Petitioner incorrectly suggests that there is a conflict among the circuit courts about the proper interpretation of *Sedima* and, in particular, about whether a plaintiff who alleges an indirect injury has RICO standing. Each court of appeals referred to by petitioner acknowledges that the proper inquiry under *Sedima*, as well as *Haroco*, is whether the alleged injury flows from the commission of the predicate acts — not whether the injury is "direct" or "indirect." *See Sperber* v. *Boesky*, 849 F.2d at 64 ("It is clear that both direct and indirect injuries must be proximately caused."); *National Enterprises* v. *Mellon Financial Services*, 847 F.2d at 254 (failure to allege that injury flowed from commission of predicate acts fatal to complaint); *Flip Side Productions, Inc.* v. *Jam Productions, Ltd.*, 843 F.2d 1024, 1035 (7th Cir.), *cert. denied*, 57 U.S.L.W. 3280 (Oct. 17, 1988) (quoting *Haroco*, court observed that " 'by reason of' language

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[5] The only cases petitioner cites finding that a dismissed employee has RICO standing are district court opinions. This alleged conflict, of course, is ordinarily not sufficient grounds for granting certiorari. *See* Rule 17 of this Court. In any event, these decisions are inapposite to this action or incorrectly set forth the governing law. *Acampora* v. *Boise Cascade Corp.*, 635 F. Supp. 66, 69 (D.N.J. 1986), and *Callan* v. *State Chemical Manufacturing Co.*, 584 F. Supp. 619 (E.D. Pa. 1984), arose in the Third Circuit and thus, after *Reynolds* v. *Diamond*, are of no precedential value. *Komm* v. *McFliker*, 662 F. Supp. 924 (W.D. Mo. 1987), involved a self-described "whistle-blower" which petitioner is not. *Williams* v. *Hall*, 663 F. Supp. 639 (E.D. Ky. 1988), is primarily concerned with standing to sue under 18 U.S.C. § 1962(d) (the conspiracy section). To the extent *Williams* grants standing even where the "overt act" that causes the injury is not a predicate act constituting part of the pattern of RICO violations it disregards the admonition in *Sedima* that the injury that confers standing on a RICO plaintiff is injury flowing "from the commission for the predicate acts." *Sedima*, 473 U.S. at 497 (footnote omitted).

[in § 1964(c)] . . . imposes a proximate cause requirement on plaintiffs"); *Bass* v. *Campagnone*, 838 F.2d at 12 ("[T]he inquiry [is] not whether the plaintiff has alleged a direct or indirect injury, but rather whether he or she has alleged an injury that 'flows from' the predicate acts."); *Grantham & Mann, Inc.* v. *American Safety Products, Inc.*, 831 F.2d 596, 606 (6th Cir. 1987) (failure to show either injury or proximate causation fatal to a § 1964(c) RICO claim); *Morast* v. *Lance*, 807 F.2d at 933 (Plaintiff's discharge "did not flow directly from the predicate acts . . . ."); *Miller* v. *Glen & Helen Aircraft, Inc.*, 777 F.2d 496, 499 (9th Cir. 1985) ("[T]he complaint properly alleges compensable injury flowing from the commission of the predicate acts."); *Terre Du Lac Ass'n* v. *Terre Du Lac, Inc.*, 772 F.2d 467, 473 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986) (Quoting *Sedima*, the court observed that "'[a]ny recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.'").

There is no need, as petitioner suggests, to review *Sedima* in light of this action. As these cases show, the circuit courts agree that the focus for determining standing is whether there is a causal nexus between the alleged injury and the predicate acts.

D. *Petitioner Seeks A Rule Of Standing He Could Not Meet Were It To Be Created*

Petitioner's assertion that he should have standing to assert a cause of action under RICO rests on his claim that he was fired because of his alleged opposition to a conspiracy by which RMC would take over Robertshaw at a price favorable to RMC to the detriment of the Robertshaw shareholders. The bench trial held on petitioner's claims against Robertshaw for breach of contract[8] considered this issue, and the district court specifically found that the "plan" did not exist: "plaintiff has failed to persuade the Court that Reynolds Metals had a 'plan' to acquire Robertshaw." *Diamond* v. *Reynolds*, No. 84-280 (D. Del. Aug. 28, 1987) (footnote omitted) (Opp. App. A25).

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[8] *See* Opp. App. A4-A29.

The district court's finding that Reynolds, RMC and Thomas did not have a "plan" to take over Robertshaw is fatal to petitioner's RICO claims. Petitioner cannot assert he was fired for "opposition" to an illegal plan that never existed. Were this Court to reverse the decision below and grant petitioner standing, petitioner would be estopped from asserting the existence of the "plan" he asserts is crucial to his claim of mail fraud. *See, e.g., Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971); *LaVay Corp.* v. *Dominion Federal Savings & Loan Ass'n*, 830 F.2d 522 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 1027 (1988).

The record before the district court further established that petitioner's "opposition" to the non-existent scheme of Thomas, Reynolds and RMC to buy Robertshaw was equally non-existent. Not once did petitioner tell a single director, warn any official from the Securities and Exchange Commission, or do anything to manifest his opposition, although he testified he had long discovered the alleged "conspiracy." (JA 421-22, 425-27.) So, far from being at daggers-drawn with respondents who, according to petitioner, fired him for opposition to their scheme, petitioner sought and received their aid. The day after he was discharged, petitioner requested Thomas (one alleged conspirator) to ask Reynolds (the main alleged conspirator) for assistance in obtaining a job with RMC (the supposed beneficiary of the conspiracy). (JA 483-86, 566.)[7]

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[7] There are two final codas to the scenario set forth in the petition. Subsequent to the date of the district court's decision dismissing the Second Amended Complaint, Siebe PLC purchased all of Robertshaw's stock, including that owned by RMC, at a very substantial premium above market. The transaction is reported in The Wall Street Journal, September 23, 1986, at 4, col. 1. This sale at a premium to a third party is of course what petitioner alleges RMC conspired to prevent. Second, subsequent to the filing of the Complaint, petitioner was found guilty of filing criminally false tax returns for 1980 and 1981, while he was serving as Robertshaw's chief financial officer (*United States* v. *Diamond*, No. 85-5259, slip op. (E.D. Va. Sept. 27, 1985), *aff'd*, 788 F.2d 1025 (4th Cir. 1986)), thus providing cause for any discharge.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari to the Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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Dated: October 24, 1988

APPENDIX

Section 1962 of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (1982)

§ 1962. Prohibited activities.

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) (1982)

§ 1964. Civil remedies.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

PATRICK H. DIAMOND,	:	
Plaintiff,	:	
v.	:	Civil Action No. 84-280 MMS
DAVID P. REYNOLDS, REYNOLDS METALS COMPANY, RALPH S. THOMAS and ROBERTSHAW CONTROLS COMPANY,	:	
Defendants.	:	

William Prickett, Esquire, and Norman Pernick, Esquire, of Prickett, Jones, Elliott, Kristol & Schnee, Wilmington, Delaware. Harold E. Kohn, Esquire, and Joanne Zack, Esquire, of Kohn, Savett, Klein & Graf, Philadelphia, Pennsylvania. Attorneys for Plaintiff.

Allen M. Terrell, Jr., Esquire, of Richards, Layton & Finger, Wilmington, Delaware. Attorneys for Defendant Robertshaw Controls Company.

MEMORANDUM OPINION

Dated: August 28, 1987
Wilmington, Delaware

SCHWARTZ, Chief Judge

Plaintiff Patrick H. Diamond claims, in Counts Five and Eight of his second amended complaint, that defendant Robertshaw

Controls Company ("Robertshaw") breached a severance agreement dated February 24, 1982 and a termination agreement dated November 18, 1983. The remaining counts of the second amended complaint have been disposed of by previous orders of the Court.[1] Robertshaw counterclaims that Diamond breached the termination agreement.

On February 9, 10, and 11, 1987, a bench trial was held on the breach of contract claims. The parties filed post-trial briefs, and oral argument was held on July 14, 1987. The following constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

I. FINDINGS OF FACT

A. *Background*

Plaintiff Diamond was Chief Financial Officer of Robertshaw from June 1980 until his departure from the company in November 1983. Trial Transcript ("Tr.") A14. He had started with Robertshaw in April 1978 as Vice President, Finance. In April 1980, Diamond joined the company's board of directors. Tr. A13-A14.

Defendant Robertshaw, a Delaware corporation with its principal place of business in Virginia, was formed by Reynolds Metals Company ("Reynolds Metals") in the 1940's. Tr. B134-B135. Thereafter, Reynolds Metals placed 50 percent of

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[1] Counts One through Three alleged violations by defendants David P. Reynolds ("Reynolds"), Reynolds Metals Company ("Reynolds Metals"), and Ralph S. Thomas of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.* The Court dismissed the RICO counts as to Reynolds and Reynolds Metals on January 13, 1986 and granted Thomas' motion for summary judgment on these counts on July 15, 1986. Count Four alleged tortious interference with prospective contractual relations against defendant Reynolds. The Court granted Reynolds' motion for summary judgment on this count on July 15, 1986. Counts Six and Seven alleged defendants Reynolds, Thomas, and Robertshaw wrongfully discharged plaintiff. The Court dismissed the wrongful discharge counts as to Reynolds on January 13, 1986 and granted Thomas' and Robertshaw's motion for summary judgment on these counts on July 15, 1986. Robertshaw is the sole remaining defendant in the case.

Robertshaw's stock on the market. Tr. B135. The amount of Robertshaw stock held by Reynolds Metals had decreased to about 30 percent by the time Diamond joined Robertshaw in 1978. Tr. B135. Reynolds Metals was always represented on Robertshaw's board of directors; at all times relevant to this suit, the chairman of the board and chief executive officer of Reynolds Metals was also chairman of the board of Robertshaw. Tr. B136. From 1978 until late 1983, three directors on Robertshaw's fifteen-member board were also employees of Reynolds Metals; thereafter and until 1986, five members of Robertshaw's board were also Reynolds Metals employees. Tr. B137-B138.

In September 1980, following a period of unusual activity in the trading of Robertshaw stock, Robertshaw initiated a number of responses to the possibility of a takeover attempt. Tr. B143. The company retained Mr. Martin Lipton of the Wachtell, Lipton, Rosen & Katz law firm and the investment banking firm of Dillon, Read & Co. Tr. A19-A21, B143; *see* Plaintiff's Trial Exhibit ("PX") 11 (minutes of September 18, 1980 executive committee meeting). Robertshaw also formed the Special Shareholders Committee ("SSC"), which was to monitor possible attempts to acquire Robertshaw and recommend responses to such attempts. Tr. A22-A23, B230. The SSC's members included Diamond; Ralph S. Thomas, president and chief executive officer of Robertshaw and a member of Robertshaw's board of directors; and Joseph A. Howell, Jr., Robertshaw's senior vice president and general counsel. *See* Tr. A21-A22.

The SSC recommended, among other things, that Robertshaw publicly proclaim its independence. Tr. A27, B145. The Robertshaw board subsequently determined that "given the Company's projections and potential for future growth, it is in its best interests to continue to remain an independent business entity." PX 24 (minutes of April 8, 1981 board meeting); *see* Tr. A28-A29, B145. Thereafter, Robertshaw publicly reiterated this policy of independence. *See* PX 49 (January 15, 1982 press release); PX 59 (January 26, 1982 press release).

In January 1982, Ametek, Inc. disclosed to the Securities and Exchange Commission ("SEC") that it had purchased about 10

percent of Robertshaw's stock and that it planned to purchase more, including the Robertshaw stock held by Reynolds Metals. *See* PX 54 (SEC Schedule 13D dated January 22, 1982). Thomas and the other members of the SSC were concerned that Ametek would attempt a "two-step" takeover of Robertshaw,[2] threatening Robertshaw's independence. Tr. A34-A36, C39-C40. Robertshaw therefore filed suit against Ametek, alleging violations of the federal securities laws and seeking to enjoin further purchases by Ametek of Robertshaw stock, including stock held by Reynolds Metals. Tr. B163-B165, C39-C40; *see* PX 64 (complaint filed January 27, 1982).

B. *The Severance Agreement*

In February 1982, the Robertshaw board of directors approved a severance agreement to be offered to Robertshaw's top executives.[3] Tr. B62; PX 86 (minutes of February 24, 1982 board

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[2] A two-step tender offer differs from a traditional tender offer. In a two-step transaction,

> the acquirer makes an initial partial offer for a control percentage of the target's stock at a set cash price, while simultaneously proposing a second step, usually a merger, in which securities of the acquirer will be exchanged for the remainder of the target's stock. The second-step securities-for-stock exchange will usually be valued at a price equal to or lower than the first-step cash price. The transaction is "front-end loaded" when the second step has a value lower than the first step.

1 A. Fleischer, *Tender Offers: Defenses, Responses, and Planning* 354-55 (1983) (footnotes omitted). The members of the SSC believed that a two-step tender offer would not be in the best interests of Robertshaw's shareholders, especially those relegated to the back end of a front-end loaded transaction. *See* Tr. A35-A37, B140-B141.

[3] Severance agreements, or "golden parachutes," essentially provide financial security for management upon a change of control. The agreements are designed to protect against risks, such as unsolicited takeovers, over which management has no control. "Moreover, these contract provisions may help attract, and retain, high level employees, and may lend greater objectivity to decisions made during consideration of a hostile tender offer." 1 A. Fleischer, *supra* note 2, at 88-89.

meeting). Diamond signed his severance agreement on February 24, 1982. Tr. B62; PX 83 (severance agreement). The agreement provides that Robertshaw "will promptly pay you upon your request as termination compensation a lump sum amount . . . in the event that within three years after a Change of Control of the Company (as hereafter defined), your employment with the Company is terminated involuntarily . . . ." PX 83, at 2. In defining "Change of Control," the agreement provides:

> For the purpose of this agreement, a "Change of Control" shall *include* (i) the acquisition of a total of 30% or more of the outstanding shares of the Company's common stock by an entity, person or group other than the Company pursuant to a tender or exchange offer or otherwise or series of related transactions, or (ii) the election, either directly or indirectly, of more than one-third of the Company's Board of Directors by any entity, person or group (except Reynolds Metals Company or a wholly owned subsidiary). Notwithstanding the foregoing, the acquisition of shares of common stock by Reynolds Metals Company, or a wholly owned subsidiary, acting on its own behalf shall not constitute a "Change of Control."

Id. at 3 (emphasis added).[4]

C. *The Alleged "Change of Control"*

Plaintiff's case hinges on whether, in the three years preceding his departure from Robertshaw in November 1983, Reynolds

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[4] At trial, Robertshaw was conditionally permitted to introduce, over plaintiff's objection, parol evidence relating to the definition of "Change of Control" in the severance agreement. *See* Tr. B51-B62, B92-B97, B152, B154-B158, B162-B163; PX 22; PX 41; PX 48; PX 61; Defendant's Trial Exhibit ("DX") 5. This evidence suggests that the drafters of the agreement, despite their choice of words, were concerned only with changes of control arising out of the acquisition of stock or the election of directors. The Court concludes, however, that the parol evidence rule bars consideration of the proffered evidence for this purpose. *See infra* at [A23].

Metals gained control over Robertshaw by some means other than the acquisition of stock or the election of directors. More specifically, plaintiff contends that Reynolds Metals, seeking to advance a purported plan to acquire Robertshaw, usurped the authority to direct Robertshaw's responses to possible takeover attempts. The following recital comprises the Court's findings of fact with respect to the alleged change of control.

1. *Robertshaw and Ametek Agree to Standstill; Exclude Reynolds Metals' Holdings*

On March 23, 1982, Robertshaw and Ametek executed a "standstill" agreement providing that Ametek would for a two-year period not seek to acquire any additional Robertshaw stock, "[e]xcept for the acquisition or attempted acquisition of shares of common stock of Robertshaw owned by Reynolds Metals Company." PX 85, ¶ 1. The agreement would terminate if, during the standstill period, Ametek acquired all or substantially all of the Robertshaw stock held by Reynolds Metals. *Id.* ¶ 4. In return for the standstill, Robertshaw agreed that its suit against Ametek would be dismissed with prejudice. *Id.* at ¶ 6.

Thomas, as president and chief executive officer, signed the standstill agreement on Robertshaw's behalf. Although the Robertshaw board of directors did not give prior approval to the agreement, Tr. A45, it was later ratified by the board. Tr. A46-A49; PX 91 (minutes of April 14, 1982 board meeting). The record does not make entirely clear who was involved in negotiating the standstill agreement. Thomas testified that Howell and Diamond, as members of the SSC, "pursued" an agreement with Ametek; Lipton's law firm was "advising" Howell and Diamond. Tr. B164-B165, C41. Diamond, however, testified that he played no part in the negotiations. Tr. A44-A46. Howell's deposition testimony indicates that William S. Leonhardt, chief financial officer and vice chairman of the board of Reynolds Metals and a member of Robertshaw's board, "participated in the negotiations as a representative of Reynolds Metals Company to the extent that Ametek insisted that it be allowed to continue to negotiate with Reynolds Metals Company

for the Reynolds block." Howell Deposition 141-42; *see* Tr. C41-C42.

On the basis of the foregoing testimony, the Court finds that Robertshaw's retained counsel and Howell negotiated the Ametek standstill agreement on behalf of Robertshaw, and that Leonhardt's participation in the negotiations was limited to the exclusion from the agreement of stock held by Reynolds Metals. Moreover, the Court credits Thomas' unrebutted testimony that the exclusion of Reynolds Metals' holdings was necessary to secure Ametek's assent to the standstill. Tr. B164.

Following the execution of the standstill agreement, Thomas sought and received assurances from Reynolds Metals that it would not sell its block of Robertshaw stock to Ametek. Tr. B166-B167; C40. Thomas at this time learned that Reynolds Metals intended instead to attempt to purchase the Ametek block. Tr. B166, C17-C18. He testified that he "was hopeful that Reynolds Metals Company would buy the Ametek stock, which meant that our company would then be operated just like it had been operated since its founding in 1948." Tr. B168.

2. *Reynolds Metals' Leonhardt Threatens Two-Step Tender Offer; Thomas Unalarmed*

Leonhardt served both as vice chairman of the board of Reynolds Metals and as a member of Robertshaw's board. Tr. A16. In a December 14, 1982 conversation with Howell, Leonhardt said: "I would like to acquire 51 percent of Robertshaw stock and tender for the rest." Howell Deposition 16. Howell testified that this "was not a serious conversation." *Id.* at 17. Nevertheless, Howell reported Leonhardt's statement two days later to Thomas and the SSC.[5] Tr. C15-C16; Howell Deposition 19-20. Thomas recognized that Leonhardt was in effect expressing his desire to attempt a two-step takeover of Robertshaw. Tr.

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[5] Leonhardt apparently had made a similar statement to Howell and Diamond in or about June 1982. Tr. A55-A58. The record does not make clear whether Howell reported this statement, the December 1982 statement, or both to Thomas on December 16, 1982. *See* Tr. C15-C16.

C16. He told the SSC that Leonhardt had similarly stated to him that Leonhardt wanted Reynolds Metals to acquire Robertshaw in a two-step transaction. Tr. A65-A67; PX 98 (Howell's notes of December 16, 1982 SSC meeting). Thomas did not report Leonhardt's statements to the Robertshaw board. Tr. C25-C26; Thomas Deposition 45-46.

In early 1983, Reynolds Metals began to purchase small amounts of Robertshaw stock, mainly in open market transactions. PX 162 (SEC Form 4's filed by Reynolds Metals). According to Diamond's testimony, Reynolds Metals had never before that time enlarged its holdings of Robertshaw stock through share purchases. Tr. A85. Although Thomas knew of the purchases, he testified that he did not recall reporting them to the Robertshaw board. Tr. C89; *see* Tr. A53.

At trial, Thomas explained that Leonhardt had advocated diversification for Reynolds Metals, but that he had been opposed by Reynolds Metals' chairman and at least two members of its board of directors. Tr. B142, B198-B199. Apparently, Thomas assumed that Leonhardt's comments about a two-step takeover of Robertshaw arose from Leonhardt's own desire for diversification, and did not represent the policy of Reynolds Metals' board.[6] *See* Tr. B198; Thomas Deposition 46-47. The Court credits Thomas' testimony, which is uncontradicted, concerning his reasons for not responding to Leonhardt's takeover threats.[7]

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[6] A Reynolds Metals document dated January 29, 1982, but otherwise unidentified, states that Reynolds Metals planned to acquire 49 percent of the outstanding shares of Robertshaw. PX 70; *see* Tr. A60-A61. Because plaintiff has not rebutted Thomas' testimony that he knew neither of the document nor of any plan by Reynolds Metals to acquire 49 percent of Robertshaw, *see* Tr. C19-C22, the Court need not determine whether such a plan in fact existed.

[7] Although hindsight is not particularly probative of the circumstances surrounding the earlier decision, the sale in 1986 of all the Robertshaw stock held by Reynolds Metals, which eliminated the possibility of a Reynolds Metals takeover, suggests that Thomas' judgment in 1982-83 was both reasonable and correct. *See* Tr. B214-B219.

3. *By-Law Amendment on Director Nominations Proposed; Later Dropped From Agenda*

In February 1983, Robertshaw received a "To Our Clients" memorandum from Lipton's law firm, setting forth a model by-law that would regulate nominations of director candidates, in part by restricting shareholder nominations from the floor at election meetings. PX 104; *see* Tr. A94, B169. Howell and Diamond recommended to Thomas that the by-law amendment be placed on the agenda for the August 16, 1983 Robertshaw board meeting. Tr. A94-A96, C50-C51. An agenda was prepared that included the amendment proposal. PX 121, item 6. At or before the board meeting, however, the Reynolds Metals employees on the Robertshaw board — David P. Reynolds ("Reynolds"), chairman of the board and chief executive officer of Reynolds Metals and chairman of the board of Robertshaw; John E. Blomquist; and Leonhardt — objected to consideration of the by-law amendment. Tr. A97-A98, B169-B170. Thomas therefore requested that the matter be tabled. Tr. C52-C53.

According to Thomas' testimony, Reynolds was "embarrassed" at the meeting because he had not received a copy of the agenda in advance and was not aware of the proposal. Tr. B170-B171, C54-C55. One month later, however, Thomas reported to Robertshaw executives a conversation with Leonhardt in which Leonhardt stated that Reynolds Metals, as a Robertshaw shareholder, remained opposed to the nominations by-law amendment. Tr. A107-A116; *see* PX 124 (Howell's notes of September 16, 1983 staff meeting).

Thomas' handwritten draft agenda for the next board meeting, which was to be held in October 1983, included the by-law amendment that had been tabled at the August 1983 meeting. PX 127, item 5. The typewritten draft of the agenda also included the proposal. PX 127A, item 9. The amendment did not appear, however, as an item on the final version of the agenda. PX 128 (agenda for October 18, 1983 board meeting). At trial, Thomas explained that he withdrew the by-law proposal from the agenda because Leonhardt had stated "that there was no way that the Reynolds Directors would be in favor of

that by-law change because it was not in the best interests of all the stockholders. . . . [a]nd I chose not to put it on because it wasn't worth a big fight." Tr. C58; *see* Tr. C59-C60.

4. *Reynolds Demands Pre-Approval of Board Meeting Agendas*

Beginning in September 1983, Thomas submitted each board meeting agenda to David Reynolds, the chairman of Robertshaw's board, for his review before sending the agenda to the other directors.[8] Tr. A116-A117, B171-B172, C55, C66. The change in procedure occurred following a conversation in which Leonhardt told Thomas that Reynolds had been embarrassed at the August board meeting because he had not received a copy of the agenda in advance. Tr. B170-B171, C54-C55. Thereafter, Thomas testified,

> [t]he agenda would be prepared, with my suggestions and the other staff members' suggestions of things that had to be placed upon it. It would then be submitted to me, and I would approve it, and Mr. [Robert E.] Sweaney, the Secretary of the corporation, would take care of checking with Mr. David Reynolds.

Tr. B172; *see* Tr. C55. Thomas reported the new agenda procedure to Robertshaw executives. Tr. A107-A109; PX 124 (Howell's notes of September 16, 1983 staff meeting).

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[8] Robertshaw concedes that a change in the agenda-setting practice occurred in September 1983. Reynolds Metals' Supplementary Answer to Interrogatory No. 3, which was admitted into evidence at trial without objection, states:

> Prior to September 1983, agendas were routinely sent to the Board of Directors of Robertshaw Controls Corporation (Robertshaw) without Reynolds' prior review. On or about September 1983 Reynolds requested that in his capacity as Chairman of Robertshaw's Board of Directors he be given the opportunity to review agendas in advance of their submission to the Robertshaw Board. Since that time Reynolds has reviewed and continues to review agendas.

Tr. A117.

Thomas asserted at his deposition that he was not required to submit board meeting agendas to Reynolds for approval, but instead did so "out of courtesy." Thomas Deposition 131-32. The Court, however, credits Diamond's lengthy trial testimony indicating Thomas was given no choice except to comply with Reynolds' wishes.[9] Tr. A110-A116. At trial, Thomas did not contradict Diamond's characterization of the events leading to the change in the agenda procedure. *See* Tr. B170-B172, C54-C55.

5. *Thomas Thwarts Proposed "Fair Price" Charter Amendment*

In December 1982, Robertshaw received a "To Our Clients" memorandum from Lipton's law firm,[10] recommending that corporations consider protecting against two-step tender offers by amending their charters to include a requirement that the second step in a hostile takeover be for cash at the same price as the first step.[11] PX 96; *see* Tr. A121-A123. Such a "fair price" amendment was discussed among members of the SSC. Tr. A123-A124, B172, C69. Thomas did not, however, attempt to bring the issue before the Robertshaw board of directors. Tr. A123, C74.

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[9] Diamond testified that he objected strongly to the new practice, but that Thomas rejected his arguments. Tr. A113-A115.

[10] As with Lipton's memorandum concerning a director nominations by-law, there is no indication that the December 1982 memorandum was directed to any individual Lipton client or to Robertshaw in particular. *See* Tr. A122-A123, B172, C68. This is also true of Lipton's subsequent memoranda of January, May, and June 1983. *See* PX 100; PX 112; PX 116.

[11] Such a "fair price" amendment assures a target's shareholders that if they choose not to tender their stock pursuant to the offer they will not be "frozen out" at a reduced price in a second-step merger, and is designed to relieve the pressure on shareholders to tender. 1 A. Fleischer, *supra* note 2, at 32. Although Diamond testified that Dillon, Read – Robertshaw's investment banker – also recommended adoption of a fair price amendment, Tr. A122-A123, Thomas could recall no such discussion. Tr. C70.

The parties offer competing explanations for Thomas' failure to promote a fair price amendment. According to Diamond's testimony, Thomas told Diamond that David Reynolds would not permit a proposal for a fair price amendment to come before the board. Tr. A124. Moreover, Diamond testified, Thomas said that such a proposal would not be adopted in any event without the support of the three directors from Reynolds Metals. Tr. A125.

Thomas testified, on the other hand, that he believed a fair price amendment to be unsound policy: "I objected to it because I thought it would set a price on the company, and I didn't feel that anybody in our whole corporation had any idea what the real value of Robertshaw was." Tr. B173. He further explained that "[t]he fair price amendment would mean that whatever was paid to the first tender was also paid to the second tender, the second group. And that may not be the right price." Tr. C72. Thomas estimated Robertshaw's per-share value at this time to be at least $60, well in excess of the stock's market price. Tr. B173-B174.

The Court does not reach the merits of Thomas' argument against a fair price amendment. On the basis of the foregoing testimony, and especially in light of Thomas' demeanor on the stand, I am satisfied his opposition was sincerely held. I therefore find Thomas' belief that a fair price amendment was not in the shareholders' best interests was the primary, if not the only, reason he chose not to put the issue before the Robertshaw board.

6. *Robertshaw and Dillon, Read Arrange Incentive Fee; Exclude Deal With Reynolds Metals*

One of Robertshaw's responses in 1980 to the possibility of a takeover attempt was the retention of the investment banking firm of Dillon, Read & Co.[12] Tr. A20, B45, B144. Thomas negotiated the fee arrangement with Dillon, Read. Tr. B179;

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[12] Dillon, Read had been Robertshaw's investment banker well before 1980. Tr. C82. Apparently, however, the firm was not specifically retained until 1980, following the period of unusual activity in the trading of Robertshaw stock. Tr. B45.

Thomas Deposition 96. The arrangement provided that Dillon, Read would receive, in addition to a flat fee for keeping a current evaluation of Robertshaw's worth, a percentage of the amount received by Robertshaw's shareholders in the event of a takeover of Robertshaw. Tr. B180, C76, C80-C81. The purpose of the arrangement was to give Dillon, Read an incentive to obtain the most favorable terms for Robertshaw's shareholders; for example, the investment banker could attempt to locate a friendly acquiror, or "white knight,"[13] willing to pay a high price for the Robertshaw stock. Tr. C76-C81.

The incentive fee arrangement, however, did not apply if Reynolds Metals successfully acquired Robertshaw. Tr. B180, C77. Thomas' testimony on the reasons he negotiated this exclusion is somewhat cryptic. He asserted that if Reynolds Metals was the acquiror, Dillon, Read "would not be involved in doing any work for the shareholders." Tr. B180. On cross examination, Thomas explained that the investment banker "would not, in my opinion, have been doing the job that an investment banker is really hired to do, if Reynolds Metals Company was involved in some type of a takeover, and owning 31 percent of the shares." Tr. C78. He acknowledged that the fee arrangement provided Dillon, Read with no incentive to obtain a high price from Reynolds Metals, but noted that "[i]t would certainly make them work like crazy to find somebody else to get a bigger price." Tr. C81.

The Court understands the foregoing testimony to mean that Thomas regarded Reynolds Metals, by virtue of its large existing block of Robertshaw stock, as a relatively obvious and easily available white knight in the event of a takeover attempt by a third party. If, on the other hand, Reynolds Metals made a tender

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[13] In the event of a tender offer, the target corporation's investment banker may seek either to negotiate a better deal with the bidder or to arrange a friendly combination with a white knight. The investment banker, in attempting to obtain a white knight, must evaluate the nature of the target's business, its historical record, its future outlook, and the quality of its management, as well as determine the time necessary to find and consummate a deal. 1 A. Fleischer, *supra* note 2, at 321-23.

offer, the fee arrangement Thomas negotiated would give Dillon, Read an incentive to locate a third party willing to pay a higher price than the price offered by Reynolds Metals. The Court credits Thomas' statement that Reynolds Metals was uninvolved in setting Robertshaw's fee arrangement with Dillon, Read. *See* Tr. B180.

7. *Robertshaw Searches for "White Knight"; Thomas Not Enthusiastic*

During the term of the Ametek standstill agreement, members of the SSC prepared several lists of potential white knights. Tr. A128-A129; *see* PX 27; PX 28; PX 34; PX 103. The SSC regarded the Raytheon Company as an especially attractive alternative. Tr. A130, B182. On August 9, 1983, Thomas met with executives of Raytheon. Tr. A134, B183. Thomas testified he understood from the meeting that Raytheon was reluctant to acquire any Robertshaw stock as a white knight unless Reynolds Metals offered its block of Robertshaw stock to Raytheon as well. Tr. B184, B187.

Later that day, Thomas reported to the SSC. Tr. A137-A138. According to Howell's notes, Thomas indicated that he expected "[n]o speedy response" from Raytheon regarding its willingness to act as a white knight. PX 120 (Howell's notes of August 9, 1983 SSC meeting). Nevertheless, Thomas stated that " 'the interest is still there.' " *Id.* Although Thomas noted that Raytheon would not make an uninvited offer to Reynolds Metals for its Robertshaw stock, he said he assured Raytheon that Reynolds Metals would not ignore a bid of $60 per share.[14] *Id.* In this connection, Thomas indicated that he would send Raytheon a "care package" containing data on Robertshaw. *Id.*; *see* Tr. A139-A140.

Thomas did not send the Robertshaw data to Raytheon, Tr. A140, nor did he meet with other potential white knights. Tr. B188-B189, C85; Thomas Deposition 79-80. Again, the parties offer competing explanations for Thomas' failure to act. According to Diamond's testimony, Thomas stopped pursuing white

[14] Thomas' suggested bid price was well in excess of the stock's market price at that time. *See* Tr. B173-B174.

knights in order to facilitate Reynolds Metals' purchase of Ametek's block of Robertshaw stock.[15] Tr. A147-A148. The Court, however, credits Thomas' testimony, which is not inconsistent with Howell's notes of the August 9, 1983 SSC meeting, that Raytheon and other potential white knights would be reluctant to acquire stock in Robertshaw without being assured that Reynolds Metals' holdings were also available. *See* Tr. B184, B187. Thomas, aware that Reynolds Metals was uninterested in selling its Robertshaw stock, Tr. B185-B186, believed further pursuit of a white knight (other than Reynolds Metals) would be futile.[16]

8. *Reynolds Snubs Questioner at Shareholder Meeting; Minutes Silent*

David Reynolds, as chairman of Robertshaw's board of directors, presided at the April 13, 1983 annual meeting of Robertshaw's shareholders. Tr. A149. Mr. George Shipp of the Investment Corporation of Virginia, which was a shareholder of Robertshaw, was present at the meeting.[17] Tr. A150. When Reynolds asked for questions from the floor, Shipp inquired about Reynolds Metals' plans with respect to its investment in Robertshaw. Tr. A151, B193. Reynolds ruled the question out of order, and refused to answer. Tr. A151, B193. Robert E. Sweaney, Robertshaw's corporate secretary, apparently was instructed not to record the question in the minutes of the annual meeting. Tr. A155-A156; Sweaney Deposition 37; *see* PX 111 (minutes of April 13, 1983 annual meeting).

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[15] Thomas delayed meeting with TRW, another white knight candidate, pending a meeting between Reynolds Metals' Leonhardt and Ametek executives. PX 124 (Howell's notes of September 16, 1983 staff meeting).

[16] Later events suggest that Thomas' belief was both reasonable and correct. In 1986, when Reynolds Metals' block of Robertshaw stock was offered for sale along with the rest of Robertshaw, Raytheon was among 51 interested purchasers. Tr. B187.

[17] Shipp had prepared a December 21, 1982 report analyzing Robertshaw's business and recommending the purchase of shares in the company. *See* PX 99.

Thomas testified that Shipp's question was inappropriate at a Robertshaw shareholder meeting because it concerned the business plans of Reynolds Metals, not Robertshaw. Tr. B194. He agreed that the question should have been neither answered nor recorded in the minutes. Tr. B193. The Court credits Thomas' explanation of the incident.

9. *Reynolds Metals Buys Ametek Block: "If That's the Good News, What's the Bad News?"*

At an October 25, 1983 Robertshaw staff meeting, Thomas reported that Reynolds Metals had acquired Ametek's 10 percent block of Robertshaw's stock,[18] which he characterized as "good news." Tr. A158, B195-196. Thomas told the meeting that the threat of a takeover was ended and that Robertshaw could once again concentrate on growth and profits. Tr. A158, B197; Howell Deposition 58. Diamond responded with a phrase that has become famous, at least in the context of this case: "If that's the good news, what's the bad news?" Tr. A158, B196; Howell Deposition 58. According to Diamond's testimony, he told Thomas that Reynolds Metals' purchase of the Ametek block made more likely an attempt by Reynolds Metals to acquire Robertshaw in a two-step takeover. Tr. A158-A159. Thomas did not recall such a discussion. Tr. B197-B198.

10. *Diamond Given Walking Papers*

On November 15, 1983, Thomas summoned Diamond to his office and asked for his resignation as an officer and director of Robertshaw. Tr. B5-B6, B201. Thomas testified that because Reynolds Metals' purchase of the Ametek block had ended the

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[18] In the fall of 1983, the Reynolds Metals board of directors, on which Thomas served, approved a banking resolution authorizing Leonhardt to purchase common stock valued at $20 million. Tr. A81. There is no evidence that the name of the corporation whose stock was to be purchased was revealed to the Reynolds Metals board. The Court therefore credits Thomas' testimony that he was unaware until October 25, 1983 that Reynolds Metals would purchase the Ametek block. *See* Tr. B195, C16-C17.

threat of a takeover, Robertshaw no longer needed Diamond's services. Tr. B199-B200. According to Thomas, about 50 percent of Diamond's time in 1983 had been devoted to SSC matters. Tr. B200.

D. *The Termination Agreement*

Thomas and Diamond executed a termination agreement dated November 18, 1983. *See* PX 136. The agreement provided that Diamond would resign as an officer and director of Robertshaw. *Id.* at 1. In addition to continuing Diamond's base salary through 1984, it provided for continued insurance benefits, a 1983 executive bonus, secretarial services, use of a company car, and payment for executive placement services. *Id.* The agreement, however, contained the following requirements:

> As long as your salary continues, though, you will not accept employment with a competitor, direct or indirect, of Robertshaw nor will you compete with Robertshaw, directly or indirectly, as an individual, in a partnership or in any other manner. You will not remove or retain any Robertshaw data or files and will return any data or files which you may have in your personal possession. You will also clear any travel advances or other indebtedness to the company and submit all outstanding expense reports by November 30.

Id. at 1-2.[19] The parties have stipulated that Robertshaw paid Diamond's salary until June 1984 and that Diamond received his 1983 executive bonus. Pretrial Order, Docket Item 121, ¶¶ 3(9)-3(12).

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[19] At trial, Robertshaw was conditionally permitted to introduce, over plaintiff's objection, prior drafts of the termination agreement suggesting that Diamond did not seek to change the relevant terms of the agreement during negotiations with Thomas. DX 6; DX 7; DX 8; *see* Tr. B70-B73; B207-B210. Because the termination agreement is clear and unambiguous, however, the proffered evidence is not only unnecessary but also plainly barred by the parol evidence rule.

Some time after his departure from Robertshaw, Diamond returned to his former office and removed numerous documents and files. Tr. B20-B22. Diamond testified that Ms. Louise Cantrell, his former secretary, told him that the materials from his office had been packed into cartons and that he was expected to remove them. Tr. B20. Diamond brought the cartons to his apartment, and in June 1984, moved them to New York. Tr. B21, C169-C170. In the meantime, on June 1, 1984, Robertshaw ceased all benefits to Diamond under the termination agreement. Tr. B30; PX 150 (Howell letter of June 8, 1984).

According to Diamond's testimony, he did not look through the cartons of materials before filing the instant lawsuit in May 1984. Tr. B80-B81, C170. He apparently did not review the contents of the cartons until he received notice of a June 21-22, 1984 deposition at which he was requested to produce documents referring to Robertshaw or to any of the other original defendants in the case.[20] Tr. B79-B80, C170-C171. At his deposition, Diamond produced over 2,500 pages of documents, including copies of minutes of Robertshaw board meetings, SSC materials, and various financial materials. *See* Diamond Deposition 233-39. Although neither party presented adequate evidence concerning the reasons Diamond removed the documents or his knowledge of their contents, the Court must credit Diamond's foregoing testimony, which defendant has not rebutted.

Diamond also retained Robertshaw documents that he had removed before his departure from the company. In particular, he kept copies of cancelled checks representing payments Robertshaw had made to some of its customers as part of a price discount program. Tr. C161. Diamond testified that he had been advised to check the endorsements on these checks to prevent fraud, and that he retained copies in the event he needed to prove his diligence. Tr. C164-C167.

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[20] *See supra* note 1 (claims against original defendants).

II. CONCLUSIONS OF LAW

A. *The Severance Agreement*

The parties offer differing interpretations of the language of the February 24, 1982 severance agreement defining "Change of Control." *See* PX 83. The agreement provides that a change of control shall "include" the acquisition by an outside entity of 30 percent or more of Robertshaw's stock or the election by an outside entity of one third or more of Robertshaw's board of directors. *Id.* at 3. A change of control is expressly deemed not to occur if Reynolds Metals acquires stock or elects directors. *Id.* Defendant argues that the acquisition of stock and the election of directors are the only events that may constitute a change of control under the agreement.[21] Plaintiff argues that a change of control under the agreement occurs whenever an outside entity gains the power to direct Robertshaw's management or policies, and is not limited to the acquisition of stock and the election of directors. Because Reynolds Metals is not expressly excluded from changes of control other than through stock acquisition and director election, the argument goes, if Reynolds Metals gained control of another kind within three years before plaintiff's termination, plaintiff is entitled to benefits under the severance agreement.

Plaintiff relies on the language of the severance agreement in arguing that it does not purport to set forth all conditions under which a change of control may occur. Specifically, in defining various terms, the agreement provides that "[f]or

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[21] Defendant also argues that Diamond's negotiated termination agreement, providing that Diamond would on November 18, 1983 "resign" as an officer and director of Robertshaw, PX 136, at 1, precludes him from claiming he was "terminated involuntarily" as the severance agreement requires. PX 83, at 2. This argument need not detain the Court. Defendant has expressly stipulated that Diamond was "forced to resign," Pretrial Order, Docket Item 121, ¶ 3(6); Thomas testified that Diamond was given no choice but to leave Robertshaw. Thomas Deposition 170-71. The Court finds that Diamond was involuntarily terminated for purposes of the severance agreement.

purposes of this agreement 'Normal Retirement Date' shall *mean* . . ." and that "[f]or purposes of this agreement, 'Good Reason' shall *mean* . . ." but that "[f]or purposes of this agreement, a 'Change of Control' shall *include* . . . ." PX 83, at 3 (emphasis added). Plaintiff contends the use of "include" instead of "mean" signifies an intent not to limit a change of control to the acquisition of stock or the election of directors.

The Court agrees that "include" in the context of the severance agreement is a word of enlargement rather than one of limitation. *See Sims* v. *Moore*, 244 So. 2d 484, 487 (Ala. 1972); *Pottsburg Utilities* v. *Daugharty*, 309 So. 2d 199, 202 (Fla. App. 1975); *Schwab* v. *Ariyoshi*, 564 P.2d 135, 141 (Haw. 1977); *Lucke* v. *Lucke*, 300 N.W.2d 231, 234 (N.D. 1980). Therefore, stock acquisition and director election are simply two illustrations of a change of control, and do not exhaust the possibilities. At trial, Robertshaw was conditionally permitted to introduce, over plaintiff's objection, evidence tending to show that the drafters of the agreement, despite their choice of words, were concerned only with changes of control resulting from the acquisition of stock or the election of directors. *See* Tr. B51-B62, B92-B97, B152, B154-B158, B162-B163; PX 22; PX 41; PX 48; PX 61; Defendant's Trial Exhibit ("DX") 5. Because the meaning of "include" is unambiguous, however, the Court holds that the Virginia parol evidence rule bars consideration of the proffered evidence for this purpose.[22] *See Hechler Chevrolet* v. *General Motors Corp.*, 337 S.E.2d 744, 749 (Va. 1985); *Renner Plumbing, Heating & Air Conditioning* v. *Renner*, 303 S.E.2d 894, 898 (Va. 1983); *Berry* v. *Klinger*, 300 S.E.2d 792, 796 (Va. 1983). Plaintiff may therefore attempt to show that Reynolds Metals gained control of another kind over Robertshaw within three years before plaintiff's termination.

B. *The Alleged "Change of Control"*

The pivotal question in this case is whether, in the three years preceding plaintiff's termination, Reynolds Metals gained control

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[22] The parties agree that the substantive law of Virginia governs the breach of contract claims in Counts Five and Eight of the second amended complaint and in defendant's counterclaim. *See* Pretrial Order, Docket Item 121.

over Robertshaw by some means other than the acquisition of stock or the election of directors. The SEC's definition of "control," useful here by way of analogy, is "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 230.405 (1987) (registration requirements under Securities Act of 1933); *id.* § 240.12b-2 (registration and reporting requirements under Securities Exchange Act of 1934). Generally, the meaning of control under the federal securities laws "is no different than it is in normal everyday usage." *United States* v. *Re*, 336 F.2d 306 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964).

Simply stated, plaintiff's theory of the facts is that Reynolds Metals, seeking to advance its plan to acquire Robertshaw in a two-step merger, gained the power to direct Robertshaw's responses to possible takeover attempts.[23] Plaintiff stresses the control allegedly exercised by Reynolds Metals over the Robertshaw board's agenda-setting process. According to plaintiff, David Reynolds' power to review board meeting agendas permitted Reynolds Metals, directly or indirectly, to suppress proposals for defensive measures such as the director nominations by-law amendment and the "fair price" charter amendment.

The Court, however, believes plaintiff's reliance on Reynolds Metals' purported agenda control to be misplaced. Nothing about Reynolds' insistence on prior approval of board meeting agendas is inconsistent with his responsibilities and prerogatives as chairman of Robertshaw's board. Although plaintiff asserts that Reynolds exceeded his authority as chairman by manipulating the agenda to further the goals of Reynolds Metals, there is no persuasive evidence that he in fact did so. First, the Reynolds Metals directors may have forced Thomas to drop the proposed by-law amendment restricting shareholder nominations of directors from the floor at election meetings. Reynolds

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[23] In light of plaintiff's theory, the Court finds that the Ametek standstill agreement is irrelevant to the change of control issue. Plaintiff alleges the agreement was designed to facilitate the sale – rather than the purchase – of Robertshaw stock by Reynolds Metals.

Metals, however, already possessed the power to nominate directors by virtue of its membership on the Robertshaw board, and had no need to rely on the floor. It is therefore very difficult to understand how as a result of the by-law amendment's defeat the interests of Reynolds Metals were advanced at the expense of other Robertshaw shareholders. Second, Thomas may have failed to promote a fair price amendment to Robertshaw's charter in the face of expected opposition from the Reynolds Metals directors. The Court is persuaded, however, that Thomas himself sincerely believed the proposal to be contrary to the shareholders' best interests.

Each of the other episodes described by plaintiff may similarly be reconciled with the proper exercise by Robertshaw's management of its own discretion. For example, Thomas chose not to respond to Leonhardt's comments about a two-step takeover of Robertshaw because Thomas assumed the threats arose from Leonhardt's own desire for diversification, not from the official policy of Reynolds Metals' board. The fee arrangement with Dillon, Read reflected Thomas' judgment that the investment banker should not have an incentive to obtain a high price from Reynolds Metals if Reynolds Metals successfully acquired Robertshaw. Nevertheless, the fee arrangement Thomas negotiated provided Dillon, Read with an incentive to locate a third party willing to pay a higher price than the price offered by Reynolds Metals. Finally, Thomas chose to abandon his pursuit of a white knight (other than Reynolds Metals) because he believed potential acquirors would be reluctant to purchase stock in Robertshaw in the absence of assurances that Reynolds Metals' holdings were also available.

In the last analysis, plaintiff has failed to persuade the Court that Reynolds Metals had a "plan" to acquire Robertshaw.[24]

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[24] The only direct evidence of a Reynolds Metals plan to acquire Robertshaw is a document, unfamiliar to Robertshaw's chief executive officer, stating that Reynolds Metals planned to purchase 49 percent of the outstanding shares of Robertshaw. PX 70; *see supra* note 6. The Court does not agree with plaintiff

(footnote continued)

A more reasonable characterization of the facts assembled at trial is that Ametek, not Reynolds Metals, posed the only genuine takeover threat. The Court is convinced that Robertshaw's managers sincerely relied on the years of fruitful co-existence between their company and Reynolds Metals — first, to encourage Reynolds Metals to purchase Ametek's block of Robertshaw stock, and second, to quiet any concerns that Reynolds Metals would use its increased holdings to attempt a takeover.[25] For the foregoing reasons, the Court finds that Reynolds Metals did not gain control over Robertshaw by some means other than the acquisition of stock or the election of directors.[26]

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that the failure to answer or record a question at the April 13, 1983 Robertshaw shareholder meeting concerning Reynolds Metals' intentions is circumstantial evidence of a Reynolds Metals plan. Moreover, the sale in 1986 of all the Robertshaw stock held by Reynolds Metals, which eliminated the possibility of a Reynolds Metals takeover, suggests that no earlier takeover plan existed. *See* Tr. B214-B219.

[25] Diamond testified throughout the trial that he was suspicious of and opposed to a possible Reynolds Metals takeover. In response to questioning by the Court, however, Diamond admitted — albeit circuitously — that he too might have viewed Reynolds Metals' purchase of the Ametek block as preferable to a purchase by Ametek of the Reynolds Metals block. Tr. B101-B112.

[26] In an apparent effort to salvage his case, plaintiff requests the Court to draw an inference that the testimony of Joseph Howell, had defendant called him as a witness, would have been adverse to Robertshaw. The "missing witness" inference operates where a potential witness under one party's control does not testify; the other party is entitled to an inference that the testimony would have been unfavorable to the party controlling the witness. *McQuaig v. McCoy*, 806 F.2d 1298, 1303 (5th Cir. 1987). If, however, the witness is equally available to both parties, the missing witness inference is impermissible. *Labit v. Santa Fe Marine*, 526 F.2d 961, 963 (5th Cir.), *cert. denied*, 429 U.S. 827 (1976). Howell was present in the courthouse throughout the trial, and there is no evidence of any personal hostility toward plaintiff. More importantly, plaintiff relied upon and introduced into evidence much of Howell's deposition; "the justification for the missing witness instruction diminishes with the availability of the tools of discovery." *Cameo Convalescent Center v. Senn*, 738 F.2d 836, 844 (7th Cir. 1984). The Court therefore declines to draw an inference from defendant's failure to call Howell as a witness.

C. *The Termination Agreement*

The November 18, 1983 termination agreement between Diamond and Robertshaw provided, among other things, "[y]ou will not remove or retain any Robertshaw data or files and will return any data or files which you may have in your personal possession." PX 136, at 1-2. Plaintiff claims that Robertshaw breached the termination agreement on June 1, 1984 in retaliation for the bringing of this lawsuit in May 1984. Robertshaw counterclaims that Diamond breached the agreement by removing Robertshaw documents and files after leaving the company and by retaining Robertshaw documents he had removed before his departure.

The Court concludes that Diamond's removal and retention of Robertshaw materials breached the express terms of the termination agreement. Nothing in the termination agreement suggests that Diamond was allowed to remove and retain copies as distinguished from original Robertshaw documents. Similarly, the agreement does not indicate that unintentional removal of company materials would be permissible.[27]

Whether Diamond's breach of the termination agreement was material, excusing Robertshaw from performance under the agreement, is less clear. *See R.G. Pope Constr. Co.* v. *Guard Rail of Roanoke*, 244 S.E.2d 744 (Va. 1978). In determining the materiality of a breach, the following factors are significant:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

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[27] Diamond cannot, of course, claim that he unintentionally retained the copies of cancelled checks representing Robertshaw's payments under its price discount program. Whatever Diamond's reasons for retaining these documents, his actions were clearly impermissible under the termination agreement.

> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241 (1981). Diamond's actions plainly deprived Robertshaw of the benefit that it reasonably expected from the termination agreement. *See* E. Farnsworth, *Contracts* § 8.16 (1982). Moreover, Diamond has neither cured the breach nor offered evidence that he will suffer forfeiture as a result of the breach.

A finding of materiality, however, requires the Court to consider also whether Diamond's behavior comported with standards of good faith and fair dealing:

> A party's adherence to standards of good faith and fair dealing will not prevent his failure to perform a duty from amounting to a breach. . . . The extent to which the behavior of a party failing to perform or to offer to perform comports with standards of good faith and fair dealing is, however, a significant circumstance in determining whether the failure is material. In giving weight to this factor courts have often used such less precise terms as "willful."

Restatement, *supra*, § 241 comment f (citations omitted). Diamond's actions with respect to the cartons of documents he removed after his departure from Robertshaw cannot be called willful or intentional. *See Jacob & Youngs* v. *Kent*, 129 N.E. 889 (N.Y. 1921) (Cardozo, J.). The Court finds that the removal of the cartons, by itself, did not amount to a material breach of the termination agreement. Diamond's retention of copies of

cancelled checks representing payments under Robertshaw's price discount program, however, was indisputably willful and intentional. Therefore, considering all the facts and circumstances, the Court finds that Diamond's breach of the termination agreement was material.

Robertshaw was excused from performance under the termination agreement from the time it discovered Diamond's material breach. *See Restatement*, *supra*, § 237 & comment b; *R.G. Pope*, 244 S.E.2d at 778. In addition, Robertshaw has a claim for damages for breach, which in this case is for the payments made to Diamond until June 1984 in reliance on the agreement. *See Restatement*, *supra*, § 243; E. Farnsworth, *supra*, § 12.16.

For the foregoing reasons, the Court will enter judgment against plaintiff on Counts Five and Eight of the second amended complaint, and will enter judgment for defendant on its counterclaim in the amount of $72,900.